



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

REHEARING
DECISION
Case #: FOF - 152978

Pursuant to petition filed October 21, 2013, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Wednesday, February 12, 2014 at 04:00 PM, at Milwaukee, Wisconsin. This matter was originally scheduled for a hearing on December 12, 2013 at 1:30 p.m. Notice of the hearing date and time was sent to the Petitioner on November 5, 2013. Prior to December 12, 2013, the respondent contacted the administrative law judge with a phone number for the hearing. On December 12, 2013, the ALJ called the respondent's phone number at 1:45 p.m. and 1:47 p.m. There was no answer and no voice mail. The hearing proceeded with the agency representative and without the respondent present. On January 13, 2014, a decision was issued finding the respondent committed an Intentional Program violation (IPV). On January 29, 2014, the respondent contacted the ALJ. He stated that he did not receive the calls on December 12, 2013. He also stated that he had believed the hearing was scheduled for 10:30 a.m. instead of 1:30 p.m. and had been prepared for a call at 10:30 a.m. on December 12, 2013. On January 29, 2014, the respondent submitted a written request for a rehearing. On February 3, 2014, the request for rehearing was granted.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FS benefits in Milwaukee County from May 14, 2012 through October 15, 2012.
2. During that period, the respondent made FS purchases at [REDACTED] Grocery Store, a small corner store that since has been disqualified for trafficking FS benefits with FS recipients.
3. [REDACTED] was disqualified for three specific bases that are tied to FS trafficking according to the USDA Food and Nutrition Services (FNS): (1) an unusual number of transactions ending in the same cents value, (2) multiple transactions made by the same purchaser in unusually short time frames, and (3) excessively large purchase transactions. The store's only cash register was through a small opening in a security window and had n price scanner. There was little counter space on which to place items for purchase. There were no shopping baskets or carts for customers to place multiple items that would add up to large purchase amounts.
4. The respondent made the following purchases at [REDACTED] Grocery on his FS card:

5/14/12, 10:06 a.m.	\$49.98
6/14/12, 12:05 a.m.	\$29.89
7/14/12, 12:01 a.m.	\$30.99
7/14/12, 12:05 a.m.	\$11.75
7/15/12, 7:22 p.m.	\$29.04
9/14/12, 12:04 a.m.	\$42.50
10/14/12, 10:50 p.m.	\$41.25

The respondent made the following purchases at other stores on his FS card:

5/14/12, 11:04 a.m., Sam's Club	\$150.20
6/14/12, 12:28 p.m., Sam's Club	\$111.90
7/14/12, 11:24 a.m., Woodman's Grocery	\$ 39.80
7/15/12, 6:03 p.m., Walmart	\$ 48.42
9/14/12, 10:26 a.m., Woodman's Grocery	\$144.89

See Exhibit 5.

5. On November 5, 2013, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent engaged in trafficking or fraudulent use of FS benefits.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 49.795(2-7).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

At the hearing, the respondent testified that the owner of [REDACTED] ran a tab for him and that the respondent would pay that tab on the 14th day of the month when his FS benefits were loaded on his card. He also testified that he had transactions at other larger stores on the 14th day of the month because if he could get a ride to a larger grocery store, he would make food purchases there. The respondent testified that he was not aware that running a tab was a violation of FS regulations. He stated that running a tab had always been a usual way of doing business with the local grocer when he was growing up.

The agency representative testified that running a tab is not considered trafficking. It is, however, a violation of the following FS regulation:

§ 274.7 Benefit redemption by eligible households. (b) Prior payment prohibition. Program benefits shall not be used to pay for any eligible food purchased prior to the time at which an EBT card is presented to authorized retailers or meal services. Neither shall benefits be used to pay for any eligible food in advance of the receipt of food, except when prior payment is for food purchased from a nonprofit cooperative food purchasing venture.

The agency's case for trafficking was based on the large dollar purchase transactions at [REDACTED] and purchases at larger stores on the same date. The respondent's testimony is credible with regard to running a tab at [REDACTED] and paying it off as soon as his FS card was loaded. The testimony is consistent with the EBT transaction summary and it is against his interest because it is a violation of FS regulations. Also, the testimony was credible with regard to purchases at larger stores on the same day in that it is credible that he paid off his tab at [REDACTED] but also shopped at the larger, less expensive stores as soon as his benefits were loaded.

The issue for the agency in this matter is the notice. The notice alleges respondent trafficked benefits. The agency concedes that paying off a tab is not trafficking. The FS regulations require the following with regard to the notice:

(iii) The notice shall contain at a minimum:

(A) The date, time, and place of the hearing;

(B) *The charge(s) against the individual;*

(C) A summary of the evidence, and how and where the evidence can be examined;

...

7 CFR 273.16(d)(3)(iii). (emphasis added).

The respondent may have violated FS program rules when he ran a tab at [REDACTED] Grocery but the notice indicates a charge of trafficking. Based upon the record before me, I find that the petitioner has not established by clear and convincing evidence that the respondent trafficked FS benefits. Nothing in this decision prohibits the agency from issuing a notice regarding a different violation of FS program rules to the respondent.

CONCLUSIONS OF LAW

The OIG has not proved, by clear and convincing evidence, that respondent trafficked FS benefits at [REDACTED] Grocery Store between May 14, 2012 – October 15, 2012.

NOW, THEREFORE, it is

ORDERED

That IPV Case Number [REDACTED] against the respondent is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4).

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

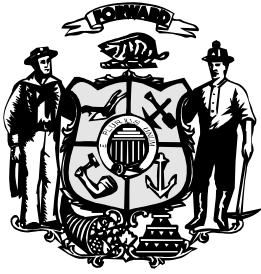
For purposes of appeal to Circuit Court, the Petitioner in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, WI 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 225.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 5th day of March, 2014

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 5, 2014.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability